IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 317 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MANGILAL UDERAM

Versus

STATE OF GUJARAT

Appearance:

MS KJ BRAHMBHATT for Petitioners

Mr.HH PATEL, A.P.P. for Respondents

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 15/06/2001

ORAL JUDGEMENT

1. This Revision is directed against an order dated 17.6.1999 of Sub-Divisional Magistrate, Choryasi Prant, Surat directing the revisionist to remove pakka compound

wall 2 ft. high above the road level on the road side constructed on Block No.992/A situated at village Kosat, Tal. Choryasi, Dist. Surat, within 2 days of the final order.

2. Ms.Kalpana J. Brahmbhatt, learned Counsel for the Revisionist and Shri H.H.Patel, learned A.P.P. for the respondents have been heard.

3. The contention of Ms.Kalpana Brahmbhatt is that impugned order is liable to be set aside as it is illegal and not in compliance of the provision of Section 133 of Criminal Procedure Code, whereas learned A.P.P. contended that the provisions of Section 133 Cr.P.C. have been duly observed by the learned Sub-Divisional Magistrate hence no interference in the revision is required. I have gone through the impugned order contained in Annexure : G as well as show cause notice contained in Annexure : E. After going through these two documents I am definitely of the opinion that there are serious infirmities and illegality in the procedure adopted by the learned Magistrate. In the show cause notice, Annexure : E, it is clearly mentioned that the Sub-Divisional magistrate, Choryasi had visited the place where objectionable construction was made and in the final order also it is mentioned that the Collector and the same Executive Magistrate Shri C.J.Patel personally visited the place where alleged obstruction to the water channel was caused by the revisionist. Such local investigation, either before issuing show cause notice or during the proceedings u/s.133 Cr.P.C., is unwarranted. The only provision which I could gather for local inspection is u/s.139 Cr.P.C. which provides that the Magistrate may for the purpose of an enquiry u/s.137 or 138 direct local investigation to be made by such person as he thinks fit or summon and examine an expert. This section therefore authorizes a Magistrate acting u/s.133 Cr.P.C. to direct local investigation to be made by such person as he thinks fit. It therefore excludes local investigation or local inspection to be made by the Magistrate himself. Section 139 further empowers such Magistrate to summon and examine an expert who had made local inspection or local investigation. There is no other provision empowering a Magistrate to make local investigation or local inspection at any stage of the proceeding. Since the learned Magistrate himself had personally visited the alleged obstruction to the flow of temporary channel during monsoon season it has violated the provisions of Section 133 Cr.P.C. This Court in MANEKLAL KARSANDAS DAVDA v/s. STATE OF GUJARAT & ANR., reported in 1991 (1) GLR 57, also took similar view that

there is no provision in Chapter : X of the Code empowering the Magistrate to conduct such an inspection himself. Since the provisions contained in Sections 133, 138 and 139 Cr.P.C. do not authorize a Magistrate to make local inspection hence an order based on the basis of such local inspection is liable to be set aside.

4. The Calcutta High Court also took similar view in S.DATTA v/s. STATE OF WEST BENGAL, reported in 1976 CRI.L.J., wherein it was held that the Executive Magistrate, who had himself taken part in local inquiry, cannot initiate proceedings u/s. 133 on the basis of such inquiry. This has, therefore, vitiated the impugned order passed by the learned Sub-Divsional Magistrate.

5. From the show cause notice as well as the impugned order it is clear that the provisions of Section 133 Cr.P.C. were not followed by the learned Sub-Divisional Magistrate. What emerges from the record is that the land over which the compound wall was constructed by the revisionist was purchased and owned by him. It was agricultural plot. May be that initially rainy water accumulated there on, but subsequently the revisionist applied for N.A. permission and got the same. He also obtained necessary permission for construction and thereafter construction work was started. The State of Gujarat or anybody else has not claimed ownership in the land over which the disputed compound wall has been constructed. It is nobody's case that the disputed construction has been raised over public place. Section 133(1)(a) Cr.P.C. provides that when the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate, specially empowered in this behalf by the State Government, on receiving the report of Police Officer or information and on taking such evidence as he thinks fit considers that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public, may make conditional order requiring such person causing obstruction, nuisance, etc. to be removed within such time as may be fixed in the order. It is not clarified in the show cause notice whether the act of construction of compound wall by the revisionist amounted to public nuisance. On the other hand what is gathered from the show cause notice is that the construction of compound wall has obstructed the channel to the flow of rainy water. Therefore it was a case where the allegation was that the revisionist caused obstruction to the channel for flow of rainy water, but this was not enough to initiate proceedings u/s.133 Cr.P.C. Further requirement

is that such channel should have been lawfully used by the public. There is no wispher either in the show cause notice or in the impugned order that the so called channel was lawfully used by the public. It was therefore not a case where obstruction was caused to a public place or to a channel for flow of water which was lawfully used by the public. Admittedly compound wall was raised over the land belonging to the revisionist and the revisionist had right to raise construction in the nature of compound wall as well as residential portion after seeking permission for N.A. use and also after obtaining permission to raise construction over his land. Since there is no finding recorded by the learned Sub-Divisional Magistrate that the water channel used to flow over a place which was used lawfully by the public, the provisions of Section 133 Cr.P.C. could not be attracted and the whole proceedings conducted by the learned Magistrate are rendered without jurisdiction.

6. There is yet another illegality in the proceedings. Even if for a moment it is presumed, for which there is no material or justification, that it was a case where obstruction was caused to the water channel over a place lawfully used by the public, further requirement for the learned Magistrate was to pass conditional order which was not done in the instant case. Mere issue of show cause notice is not a conditional order as envisaged by Section 133 Cr.P.C. After passing conditional order notice should have been issued to the revisionist and it should have been served on him. Admittedly the show cause notice was served. The revisionist appeared and filed reply stating that it was not a public place or public land where construction was raised by him. On the other hand he pleaded that the construction was raised over the land owned by and belonging to him. It was therefore a case where the revisionist denied existence of public passage or public place where water channel used to flow. The contention on behalf of the revisionist is that there was regular water channel adjoining the disputed land and since that water channel was filled up and road was constructed slightly higher to the level of the disputed land that the water used to collect during rainy season over the land of the revisionist. This aspect of the matter is not to be examined in this revision. Suffice it to say that there was denial of existence of public right for flow of water over the revisionist's land. If it was a case of denial of existence of public right then the provisions of Section 137 Cr.P.C. were attracted and the obligation on the part of the Magistrate was to question generally to the revisionist about denial of existence of

public right or water channel which was used by the public in general. Enquiry should have been conducted by the Magistrate as contemplated u/s.137 Cr.P.C. in this light. If in such enquiry the Magistrate found that there was any reliable evidence in support of denial of such right the proceedings should have been stayed by him and he should have directed the parties to get the matter decided by a competent Court. If on the other hand the Magistrate found that there was no reliable evidence he should have proceeded u/s.138 Cr.P.C. and then only the impugned order could have been passed. These two provisions were also not followed by the learned Sub-Divisional Magistrate which has initiated the entire proceedings rendering the impugned order illegal.

7. For the reasons stated above the revision succeeds and is hereby allowed. The impugned order dated 17.6.1999 is set aside. As a consequence of this Judgment the stay order passed in this revision automatically stands vacated. As such Direct Service is permitted.

sd/-

Date : June 15, 2001 (D. C. Srivastava, J.)

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